Supreme Court, U.S.
FILED
FEB 03 2000
CLERK

No. 99-1125

IN THE
SUPREME COURT OF THE UNITED STATES

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, INC.
Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

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February 3, 2000 **Counsel of Record*

QUESTION PRESENTED

Whether the Court should grant review of the court of appeals' affirmance of the district court's denial of relief from final judgment under Fed. R. Civ. P. 60(b)(6) where (1) the district court considered as an equitable ground for denying relief the movant's history of bad faith litigation tactics intended to delay the ultimate resolution of the case, and (2) neither the district court nor the court of appeals found that there were extraordinary circumstances that would justify Rule 60(b) relief.

LIST OF PARTIES AND AFFILIATES

The following parties are respondents: Reimer & Koger Associates, Inc., Ronald Reimer; Kenneth H. Koger; Clifford W. Shinski; Brent Messick; Robert Crew; Sherman Dreiseszun; I.I. Ozar; Frank Sebree; Gage & Tucker; Peat, Marwick, Mitchell & Co.; KPMG Peat Marwick LLP; Robert W. Spence; Thomas S. Morgan and Marilyn J. Morgan, co-executors of the estate of Frank S. Morgan; Shook, Hardy & Bacon, through C. Patrick McLarney acting as a representative of the class of all partners in Shook, Hardy & Bacon; Shook, Hardy & Bacon P.C.; Blackwell, Sanders, Peper, Martin, L.L.P.; and William H. Sanders, Sr.

In addition, Michael Russell was a defendant in the district court, and the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Pursuant to Rule 29.6, respondent Shook, Hardy & Bacon has no parent companies or subsidiaries. Shook, Hardy & Bacon L.L.P. is the successor to Shook, Hardy & Bacon. Shook, Hardy & Bacon L.L.P. owns SHB Registered Agent, Inc., a Missouri corporation, and SHB Kansas Registered Agent, Inc., a Kansas Corporation. Certain partners in Shook, Hardy & Bacon L.L.P. are also partners in Shook, Hardy & Bacon, a multinational partnership.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, INC.,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

COUNTERSTATEMENT OF THE CASE

The petition of Kansas Public Employees Retirement System, Inc. (KPERS) raises no issue worthy of review. The arguments advanced by KPERS rest on an incorrect reading of the Eighth Circuit's decision. The Eighth Circuit did not adopt a new inquiry under Fed. R. Civ. P. 60(b) that conflicts with the text of the Rule or with federal precedent, or, indeed, any "new inquiry" at all. Rather, the decision reflects nothing more than the routine application of the abuse of discretion standard of appellate review to the district court's fact-bound equitable balancing under Rule 60(b)(6).

1. Procedural History

KPERS' statement of the case is both incomplete and inaccurate. The nine-year history of this case undermines, rather than supports, KPERS' petition.

a. The Parties and the Claims Asserted

In 1991, KPERS filed suit in Kansas state court against the former directors of Home Savings Association, F.A. of Kansas City, Missouri ("Home Savings") and others seeking damages for losses on investments it made in Home Savings in 1986. KPERS' claims are "conventional" common law or statutory tort claims seeking money damages only. *See KPERS v. Reimer & Koger Assocs., Inc. ("KPERS II")*, 60 F.3d 1304, 1306 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc. ("KPERS IV")*, 77 F.3d 1063, 1071 (8th Cir.), *cert. denied*, 519 U.S. 948 (1996). They are being pursued by private counsel under a contingency fee agreement with KPERS.

On March 17, 1992, the Home Savings director defendants moved to dismiss KPERS' claims in lieu of answering the complaint. On May 14, 1992, the Resolution Trust Corporation ("RTC") as successor-in-interest to Home Savings moved to intervene to prevent KPERS from pursuing derivative claims owned by the RTC. While the RTC's motion was pending, the state court denied the Home Savings directors' motion to dismiss. The Home Savings directors then filed an answer which included a third-party claim against the RTC.

b. KPERS' Attempted Ex Parte Severance of the RTC Claims and Its Motions for Remand

KPERS responded to the RTC's joinder by filing an "emergency" severance motion "for the sole purpose of defeating [the RTC's] congressionally conferred right" to remove the case to federal court, 12 U.S.C. § 1441a(*l*)(3)(A). *KPERS v. Reimer & Koger Assocs., Inc. ("KPERS I")*, 4

F.3d 614, 617 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994). The Kansas state trial judge granted KPERS' motion in an *ex parte* hearing held after normal business hours without notice to opposing counsel. *Id.* at 616-19. Notwithstanding the severance order, the RTC removed the case to federal court in Kansas City, Missouri, the location of Home Savings, on October 13, 1992.

KPERS sought remand on the ground that the third-party claims against the RTC had been severed so that only those claims had been removed to federal court. In an order affirmed by the Eighth Circuit, the district court denied remand because the state court's *ex parte* severance of the third-party claims violated the Supremacy Clause and was therefore void. *Id.* at 617; *see also id.* at 619 (sole purpose of the severance was to "keep the original action in state court by preventing the RTC from exercising its federal right to remove").

KPERS' renewed motion to remand following the dismissal of the RTC as a third-party defendant was denied because of the extraordinary actions taken by the state court to interfere with the RTC's statutory removal right, the significant federal judicial resources that had already been invested in the case, and the likelihood that the RTC would intervene again following any remand, resulting in the case returning to federal court. KPERS did not seek interlocutory review of that decision.

c. The Statute of Limitations Rulings

On October 22, 1993, the Home Savings director defendants filed a motion for summary judgment on their statute of limitations defense. KPERS opposed the motion on the ground that its claims arose from a governmental function and thus were exempt from any statute of limitations. Alternatively, KPERS argued that if its claims were subject to a statute of limitations, it was K.S.A. § 60-522, the ten-year

statute of limitations enacted in 1992 for claims asserted by KPERS. KPERS did not ask the district court to certify either of these issues of Kansas state law to the Kansas Supreme Court.

The motion was denied in part and granted in part. The district court held that Kansas limitations law, rather than the law of the forum, governed KPERS' claims. It rejected KPERS' argument that its investment activity was a governmental function but held that the newly-enacted special ten-year statute governed KPERS' claims and applied retroactively to revive even time-barred claims. *See KPERS v. Reimer & Koger Assocs., Inc.* (*KPERS III*), 61 F.3d 608, 610-11 (8th Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996).

The district court certified its ruling for interlocutory appeal, and the Home Savings directors appealed from the holdings adverse to them — that KPERS' claims are subject to Kansas limitations law and that they were retroactively revived by K.S.A. § 60-522. KPERS did not cross-appeal from the ruling that KPERS' claims are subject to applicable statutes of limitations because they arose from proprietary, rather than governmental, activity, nor did it request certification of that issue to the Kansas Supreme Court.

The case proceeded through fact discovery, and a trial date was set for January 1996. On July 27, 1995, the Eighth Circuit issued its decision reversing the district court. *KPERS III*, 61 F.3d 608. Applying federal choice of law principles made applicable by the RTC's removal under 12 U.S.C. § 1441a(*l*), the Eighth Circuit held that KPERS' claims are governed by the statute of limitations of the forum state, Missouri. Applying Kansas limitations law pursuant to the Missouri borrowing statute, it further held that the newly-enacted special ten-year statute did not revive claims that were already time-barred and remanded the case to the district court to determine if KPERS' claims were barred

under the two- and three-year Kansas statutes applicable to common law and statutory tort claims. *KPERS III*, 61 F.3d at 614-15.

In a petition for rehearing, KPERS asked the Eighth Circuit to certify the question of the retroactivity of the ten-year statute to the Kansas Supreme Court, but it did not request certification of whether KPERS performs a proprietary or governmental function for statute of limitations purposes. When the Eighth Circuit denied rehearing, KPERS filed a petition for certiorari raising only the retroactivity and federal choice of law issues, which was denied on February 20, 1996.

d. KPERS' Efforts To Disrupt the Progress of the Case

KPERS' response to *KPERS III* was a series of maneuvers which the district court and Eighth Circuit found were intended to delay the progress of the case in federal court. On August 23, 1995, KPERS filed duplicative lawsuits against the defendants in Kansas state court in an admitted effort to obtain a more favorable ruling on the statute of limitations issues. *See KPERS IV*, 77 F.3d 1063 (affirming district court injunction against KPERS initiating any additional duplicative suits in state court based on the Home Savings investments), *KPERS v. Reimer & Koger Assocs.* (*KPERS VIII*), 165 F.3d 627 (8th Cir. 1999) (affirming district court's order awarding sanctions relating to KPERS' filing of duplicative action).

On September 12, 1995, KPERS filed a third ("second renewed") motion to remand this case to state court and, at the same time, a motion for reconsideration and certification of the governmental-proprietary issue. In its order denying KPERS' motion for reconsideration, the district court described it as another "one of KPERS' attempts to avoid the impact" of *KPERS III*, raising no new issues, and noted

KPERS' earlier tactical decision not to present the governmental-proprietary issue to the Eighth Circuit when it had the opportunity in the *KPERS III* appeal.[1]

While KPERS' motions for remand and reconsideration were pending, KPERS also moved to disqualify District Judge D. Brook Bartlett as "part of a strategic and tactical plan to delay and prevent the district judge from ruling on the pending summary judgment motions" following the *KPERS III* decision. *In re KPERS ("KPERS V")*, 85 F.3d 1353, 1359-61 (8th Cir. 1996) (denying KPERS' petition for writ of mandamus to compel recusal).

e. The District Court's Holding That KPERS' Claims Are Time-Barred

Once KPERS' tactical motions were resolved, the district court turned to the motions for summary judgment filed by Shook Hardy and other defendants pursuant to the Eighth Circuit's *KPERS III* decision. The district court determined that KPERS' claims had all accrued by no later than December 1986, more than three years before KPERS sued.[2] The district court accordingly granted the motions, dismissed all of KPERS' claims against those defendants as time-barred, and entered final judgment pursuant to Fed. R. Civ. P. 54.

On appeal from the final judgment of dismissal, KPERS made its first request to the Eighth Circuit to certify the governmental-proprietary issue to the Kansas Supreme Court. In a May 13, 1997 decision, the Eighth Circuit held that its implicit ruling in *KPERS III* that KPERS was not exempt from generally applicable statutes of limitations was the law

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[1] *See KPERS v. Reimer & Koger Assocs., Inc.*, No. 92 CV 922, Order (W.D. Mo. Oct. 25, 1995).

[2] *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C. ("KPERS VI")*, 114 F.3d 679, 691 (8th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998).

of the case[3] and affirmed the district court's ruling that KPERS' claims were time-barred. KPERS' petition for rehearing and for rehearing *en banc* was denied by the Eighth Circuit on June 12, 1997, and the mandate issued on June 20, 1997.

f. The Kansas Supreme Court's Decision

After the Eighth Circuit issued its mandate, the Kansas Supreme Court issued its decision on statute of limitations issues in several KPERS failed investment cases pending in state court. *See KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321 (Kan. 1997). The Kansas Supreme Court disagreed with the Eighth Circuit's *KPERS III* decision concerning the specific Kansas limitations period applicable to KPERS and held that KPERS' claims are subject to the special KPERS ten-year statute of limitations enacted in 1992, not the two-and three-year statutes applicable to all other tort and statutory claims, and that the new statute retroactively revived barred claims.[4]

KPERS then filed a second petition for rehearing requesting the Eighth Circuit to vacate its judgment in *KPERS VI* and to recall its mandate to apply the Kansas Supreme Court's decision.[5] The Eighth Circuit denied the second petition on September 9, 1997. On September 10, 1997, KPERS filed its fourth petition for writ of certiorari,

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[3] *See KPERS VI*, 114 F.3d at 688 & n.11.

[4] Contrary to KPERS' suggestion, Petition ("Pet.") at 2, 13, the Kansas Supreme Court held that KPERS was not immune from statutes of limitations once the legislature adopted the special ten-year statute for KPERS.

[5] *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, Nos. 96-3262, 96-3317, 96-3680, Plaintiff-Appellant's Second Petition for Rehearing and Suggestion for Rehearing *En Banc* (8th Cir. filed July 16, 1997).

arguing that principles of federalism required a new rule compelling federal courts of appeal either to defer ruling or to certify questions of state law involving state-agency plaintiffs to a state court that is currently considering the same issue. The petition was denied on January 12, 1998. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi*, 522 U.S. 1068 (1998).

The Eighth Circuit was then presented with the appeal in this case of co-defendant Michael Russell, whose *pro se* motion for summary judgment had been filed after the Eighth Circuit's *KPERS III* decision. *KPERS v. Russell* (*KPERS VII*), 140 F.3d 748 (8th Cir. 1998). Russell neither appeared nor filed a brief on appeal. Applying the intervening Kansas Supreme Court decision, the Eighth Circuit held that KPERS' claims against Russell were timely under the special ten-year statute of limitations for KPERS.

On April 20, 1998, KPERS moved for rehearing of this Court's denial of its petition for certiorari review of the decision affirming final judgment in favor of the other defendants because of the different outcome in the later Russell appeal. KPERS' motion was denied on May 18, 1998. 523 U.S. 1134 (1998). KPERS then moved in the district court for Rule 60(b) relief from final judgment on the same ground.

The district court denied KPERS' motion on multiple alternative grounds. First, the district court found that the grounds asserted in KPERS' Rule 60(b) motion had already been presented to the Eighth Circuit and rejected. Second, the district court found that neither the *Russell* decision nor the Kansas Supreme Court's decision was an "extraordinary circumstance" warranting relief under Rule 60(b). Finally, the district court found that the long history of the litigation and KPERS' misconduct throughout weighed strongly

against overturning the final judgment.[6] The Eighth Circuit affirmed on October 5, 1999. *KPERS v. Reimer & Koger Assocs., Inc.*, 194 F.3d 922 (8th Cir. 1999), Pet. App. at 1a.

The Eighth Circuit recited each of the grounds for the district court's holding and noted that the decision was based on equitable considerations as well, referencing the "history of this case" and various instances of litigation misconduct by KPERS. Pet. at 5a-6a. Although the Eighth Circuit acknowledged that the factors KPERS relied on as purported "extraordinary circumstances" under Rule 60(b) "have been considered relevant in other cases," it expressly held that those factors did not "compel the conclusion that the district court abused its discretion in denying KPERS's motion." Pet. at 5a.

On January 3, 2000, KPERS filed its fifth petition for certiorari, this time seeking review of the Eighth Circuit's decision affirming the district court's order denying Rule 60(b) relief.

REASONS FOR DENYING THE WRIT

I. KPERS' PETITION IS PREDICATED ON AN INCORRECT READING OF THE EIGHTH CIRCUIT'S OPINION.

KPERS' petition should be denied because it rests on a misreading of the Eighth Circuit's opinion. KPERS argues that the Eighth Circuit held that there were "extraordinary

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[6] *See* Appendix to KPERS' petition ("Pet. App.") at 11a ("Only passing familiarity with the history of this case in this court and in the appellate courts would convince any fair-minded person that the time has come to for this court to echo the Eighth Circuit Court of Appeals—this case is over. To the extent, if at all, that equitable considerations have an effect on Rule 60(b) relief, KPERS long-ago abandoned any persuasive claim to equity.").

factors" that "required granting" relief[7] but affirmed the district court solely because of litigation misconduct by KPERS earlier in the case. The effect of this purported holding, KPERS argues, was to "engraft[]" on to Rule 60(b) a new requirement that is inconsistent with both the Rule and precedent, and the application of which to KPERS violates principles of federalism. Pet. at 17-19.

The premise of KPERS' argument is wrong. The district court denied KPERS' Rule 60(b) motion for three reasons: because the grounds asserted in KPERS' motion had already been rejected by the Eighth Circuit; because there are no extraordinary circumstances that would warrant Rule 60(b) relief; and because various equitable considerations weigh against Rule 60(b) relief. Pet. App. at 9a-11a. The extent of the Eighth Circuit's holding concerning KPERS' proffered "extraordinary circumstances" was an acknowledgement that, "[w]hile these factors have been considered *relevant* in other cases, they do not compel the conclusion that the district court abused its discretion in denying KPERS's motion." Pet. App. at 5a (emphasis added). Nowhere did the Eighth Circuit even hint that these factors, either alone or in combination, would compel or even permit Rule 60(b) relief in this case.

KPERS also misrepresents the record when it claims that the equitable considerations identified by the district court and the Eighth Circuit consist exclusively of "unclean hands" arising from KPERS' efforts to have the statute of limitations issues decided by a Kansas state court.[8] The

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[7] Pet. at 16. *See also* Pet. at i, Question Presented ("Whether a sovereign State . . . may be denied Fed. R. Civ. P. 60(b) relief *to which it is otherwise entitled* . . . ." (emphasis added)).

[8] Neither the district court nor the Eighth Circuit used the term "unclean hands."

district court's consideration of equitable factors extended to the long "history of the case" and KPERS' course of conduct in its entirety, Pet. App. 5a-6a, including numerous and specific instances of misconduct by KPERS.[9]

Because the premise of KPERS' petition – that is was denied relief to which it was otherwise entitled as a result of an erroneous application of a "clean hands" requirement by the Eighth Circuit – is incorrect, its petition should be denied.

II. THE EIGHTH CIRCUIT DID NOT "ENGRAFT[] UPON RULE 60(b)" ANY GENERALLY APPLICABLE INQUIRY.

Even if the Eighth Circuit's affirmance rested exclusively on KPERS' litigation misconduct, that would not justify review by this Court. The Eighth Circuit did not, as KPERS asserts, Pet. at 19, either expressly or implicitly "engraft[] upon Rule 60(b)" a new inquiry concerning the balancing of equitable factors under Rule 60(b).

The Eighth Circuit's decision is an example of the routine application of the abuse of discretion standard of appellate review. It did not purport to establish any rule of general application beyond the facts of this particular case. Nothing in the Eighth Circuit's decision requires a district

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[9] Both the district court and the Eighth Circuit reference prior decisions reciting a range of misconduct of by KPERS in this case. *See* Pet. App. at 6a, *citing KPERS I*, 4 F.3d 614 (addressing KPERS' attempt early in the case to obtain an ex parte severance from the Kansas state court in order to frustrate the RTC's removal right). The district court also cited to *KPERS V*, 85 F.3d 1353, where the court of appeals found that KPERS had undertaken a "flurry of actions," including filing a motion to disqualify the district judge and a related petition for mandamus following denial of the motion, as "part of a strategic and tactical plan to delay and prevent the district judge from ruling on the pending summary judgment motions." *Id.* at 1359.

court generally to deny Rule 60(b) relief where the movant previously has engaged in litigation misconduct, or even to consider such misconduct in weighing the equities in future cases under Rule 60(b).

In the absence of any articulable rule flowing from the Eighth Circuit's opinion that courts could apply in future cases, the decision does not warrant review by the Court.

III. CONSIDERATION OF PRIOR LITIGATION MISCONDUCT AS AN EQUITABLE FACTOR UNDER RULE 60(b) IS AN APPROPRIATE EXERCISE OF DISCRETION.

A. The Eighth Circuit's Opinion Does Not Conflict with Rule 60(b) or Precedent.

Even if the Eighth Circuit had held that "unclean hands" arising from previous litigation misconduct, without more, was a sufficient ground for denying Rule 60(b) relief, such a holding would not "conflict[] with numerous decisions of this Court" and other circuit courts, Pet. at 17, 19. KPERS fails to identify a single case that is in actual conflict with the Eighth Circuit's decision.[10] Review is not

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[10] Trial courts do consider such conduct. *See, e.g., Sony Corp. v. S.W.I Trading, Inc.*, 104 F.R.D. 535, 541 (S.D.N.Y. 1985) (Rule 60(b) motion seeking relief for mistake denied because of movant's "unclean hands, both in violating plaintiffs' trademark and in violating the settlement agreement with plaintiffs not to infringe the Sony trademark"); *Nalco Chem. Co. v. Hydro Techs., Inc.*, 148 F.R.D. 608, 617 (E.D.Wis. 1993) (whether Rule 60(b) movant in trade secret case stole competitor information was relevant equitable factor in determining whether to grant relief from judgment). Not one of KPERS' cases has anything to do with Rule 60(b) and prior litigation misconduct, let alone holds that consideration of such misconduct would be an abuse of discretion.

called for in the absence of a real or intolerable conflict on the same matter of law or fact, which is not present here.[11]

KPERS' only real argument is that the decision below was wrong – hardly a reason to impose a new rule circumscribing the abuse of discretion standard traditionally applied by courts of appeal.[12] It is difficult to conceive of any practical rule that this Court could fashion that would not cause more harm than good. KPERS' suggestion of a bright-line rule that would bar appeals courts from considering prior litigation misconduct as a basis for denying Rule 60(b) relief would only invite litigants to engage in bad faith litigation tactics.

B. KPERS Was Not Placed in a Catch 22.

KPERS' argument that the Eighth Circuit's holding imposes an impermissible "Catch 22" on litigants is also flawed. According to KPERS, because it had to work "diligently to prevent the entry of [an] erroneous judgment" in order to be eligible for Rule 60(b) relief, Pet. at 20, its various maneuverings to put its claims before a Kansas state court cannot fairly constitute a bar to Rule 60(b) relief.

KPERS' argument is specious. On several occasions, KPERS crossed the line from zealous advocacy to overzealous, obstructionist and even sanctionable litigation con-

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[11] *See National Labor Relations Bd. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951).

[12] *See, e.g., In re: Emergency Beacon Corporation v. Barr*, 666 F. 2d 754, 760 (2d Cir. 1981) (trial court's discretion is "especially broad under subdivision (6), because relief under it is to be granted when appropriate to accomplish justice") (quotation omitted); *Lee v. Village of River Forest*, 936 F.2d 976, 979 (7th Cir. 1991) (abuse of discretion "established only when no reasonable person could agree with the district court.").

duct.[13] Nothing in Rule 60(b) or the cases interpreting it compels litigants to advocate to the brink of sanctions and beyond before they are entitled to seek relief under Rule 60(b). KPERS cannot cite a single case supporting its novel position.

C. The Eighth Circuit's Decision Is Not Contrary to Principles of Federalism.

KPERS' final argument -- that principles of federalism justify review because KPERS is a Kansas agency -- is meritless. KPERS argues that the prior efforts of a *state-agency* plaintiff in a federal case to have its claims decided by a state court cannot later be used as a basis for denying Rule 60(b) relief to which it would otherwise be entitled. Pet. at 21. This argument depends on the same mistaken premise that the Eighth Circuit held that KPERS was otherwise entitled to relief but for its "unclean hands."

Moreover, KPERS' suggestion that federalism immunizes state-agency litigants in federal court from equitable considerations applicable to other litigants is impractical. Such a rule permitting a state-agency to litigate in bad faith with impunity whenever its actions are directed to shifting the forum finds no support in principles of federalism.

The thrust of KPERS' argument concerning federalism is that the district court and court of appeals erred repeatedly in retaining jurisdiction over this case or in refusing to certify questions to the Kansas court because KPERS is a Kansas agency, *see* Pet. at 21-22. These arguments have

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[13] The Eighth Circuit has affirmed an award of attorneys' fees against KPERS under 28 U.S.C. § 1927, *KPERS VIII*, 165 F.3d at 629, and has sanctioned KPERS under Federal Rule of Appellate Procedure 38 for taking a frivolous appeal, (Eighth Circuit Order Dated October 4, 1999, in Case No. 97-2811, and Eighth Circuit Order Dated November 8, 1999, in Case No. 97-1880).

been considered and rejected in numerous prior rulings – on motions to remand, interlocutory appeals, and petitions for certiorari (*see* Pet. at 9-16) – and present no new basis for review by this Court.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be denied.

Respectfully submitted,

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February 3, 2000